TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 497

THE FIRST NATIONAL BANK OF CONCORD, NEW HAMPSHIRE, PLAINTIFF IN ERROR,

vs.

HOWARD HASTINGS, RECEIVER OF THE INDIANAPOLIS NATIONAL BANK OF INDIANAPOLIS

IN ERROR TO THE SUPREME JUDICIAL COURT OF NEW HAMPSHIRE

(16,704.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 187.

THE FIRST NATIONAL BANK OF CONCORD, NEW HAMPSHIRE, PLAINTIFF IN ERROR,

vs.

EDWARD HAWKINS, RECEIVER OF THE INDIANAPOLIS NATIONAL BANK OF INDIANAPOLIS.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

INDEX.

	Original.	Print.
Caption	*a*	1
Writ of error to United States circuit court of appeals	1	1
Clerk's certificate and return	2	2
Transcript of record from the circuit court of the United States for the district of New Hampshire	3	2
Writ of error	3	2
Return on writ of error	4	3
Caption	5	3
Declaration	5	4
Stipulation waiving jury	8	5
Statement of facts by the court	8	6
Ruling by the court and exceptions	9	7
Bill of exceptions	10	7
Statement of facts	10	7
Ruling and exceptions	11	8

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 29, 1898.

	Original.	Print.
Judgment	11	8
Petition for writ of error	12	9
Assignment of errors	12	9
Bond on writ of error	14	11
Citation	15	12
Clerk's certificate	16	13
Opinion	17	13
Judgment	20	15
Petition for rehearing	21	15
Opinion on petition for rehearing	24	17
Order that mandate issue	25	18
Assignment of errors	26	18
Clerk's certificate	28	20
Bond on writ of error	29	20
Citation	30	21
Proof of service of citation	31	22

a United States Circuit Court of Appeals for the First Circuit, October Term, 1896.

FIRST NATIONAL BANK OF CONCORD, Defendant, Plaintiff in Error,
v.
EDWARD HAWKINS, Receiver, Plaintiff, Defendant in Error. } No. 202.

Error to the circuit court of the United States for the district of New Hampshire.

Judgment in circuit court (Aldrich, J.) August 24, 1896.

Writ of Error to United States Circuit Court of Appeals for the First Circuit and Return of said United States Circuit Court of Appeals Thereon.

1 Writ of error to United States circuit court of appeals for the first circuit.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the first circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals, before you or some of you, between The First National Bank of Concord, New Hampshire, plaintiff in error, and Edward Hawkins, receiver, defendant in error, a manifest error hath happened, to the great damage of the said First National Bank of Concord, New Hampshire, plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the twenty-first day of September, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
HORACE GRAY,
Associate Justice of the Supreme Court of the United States.

2 *Return of United States Circuit Court of Appeals for the First Circuit on Writ of Error.*

United States Circuit Court of Appeals for the First Circuit.

And now here the judges of the United States circuit court of appeals for the first circuit make return of this writ by annexing hereto and sending herewith a true copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said United States circuit court of appeals for the first circuit, hereto set my hand and affix the seal of said court, at Boston, in the first judicial circuit, this sixteenth day of October, A. D. 1897.

Seal United States Circuit Court of Appeals, First Circuit.

JOHN G. STETSON, *Clerk.*

3 *Transcript of Record and All Proceedings in United States Circuit Court of Appeals for the First Circuit.*

United States Circuit Court of Appeals for the First Circuit, October Term, 1896.

FIRST NATIONAL BANK OF CONCORD, Defendant, Plaintiff in Error,
v.
EDWARD HAWKINS, Receiver, Plaintiff, Defendant in Error. } No. 202.

Writ of Error to Circuit Court.

[L. S.] UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of New Hampshire, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said circuit court, before you, or some of you, between Edward Hawkins, receiver, plaintiff, and The First National Bank of Concord, defendant, a manifest error hath happened, to the great damage of the said First National Bank of Concord, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the first circuit, together with this writ, so that you have the same at the city of Boston, Massa-

chusetts, on the sixth day of October next, in the said circuit court of appeals, that, the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further
4 to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this sixteenth day of September, in the year of our Lord one thousand eight hundred and ninety-six.

FREMONT E. SHURTLEFF,
[L. S.] *Clerk of the Circuit Court of the United States,*
District of New Hampshire.

Allowed by—
EDGAR ALDRICH,
Presiding Judge.

Return of Circuit Court on Writ of Error.

CIRCUIT COURT OF THE UNITED STATES, *District of New Hampshire,* } ss:

And now here, the judges of the circuit court of the United States, in and for the district of New Hampshire, make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States circuit court of appeals for the first circuit, as within commanded.

In testimony whereof, I, Fremont E. Shurtleff, clerk of said circuit court of the United States, in and for the district of New Hampshire, have hereto set my hand and the seal of said court this fifth day of October, A. D. 1896.

[SEAL.] FREMONT E. SHURTLEFF, *Clerk.*

A true copy of writ of error to circuit court and of return of circuit court thereon.

Attest: JOHN G. STETSON, *Clerk.*

5 *Transcript of Record of Circuit Court.*

(Filed in circuit court of appeals Oct. 6, 1896.)

UNITED STATES OF AMERICA, *District of New Hampshire,* } ss:

At a circuit court of the United States for the first circuit, begun and holden at Portsmouth within and for the district of Massachusetts, on the eighth day of May in the year of our Lord one thousand eight hundred and ninety-six.

Before the Honorable Edgar Aldrich, district judge, presiding.

EDWARD HAWKINS, Receiver,
v.
FIRST NATIONAL BANK OF CONCORD, NEW HAMPSHIRE. } No. 405, Law Docket.

Edward Hawkins, of Indianapolis, in the district of Indiana, as he is receiver of the Indianapolis National Bank of Indianapolis, a national banking association established and organized under and in pursuance of the laws of the United States of America, and located in Indianapolis, in said district of Indiana, who sues out this writ under the direction and by the authority of the Comptroller of the Currency, against the First National Bank of Concord, N. H., a national banking association established and existing under the laws of the United States of America and located in Concord, in said State of New Hampshire.

Declaration.

(Filed May 8, 1895.)

In a plea of debt for that, the said last-named association, on, to wit, July 24, A. D. 1893, failed, suspended, and became insolvent, and the total capital stock of said association, at the date of
6 such failure, was three hundred thousand dollars, and the defendant at the date of such failure, held and owned in its own right one hundred shares of said stock of the par value of ten thousand dollars; and, whereas on the third day of August, A. D. 1893, the plaintiff was by the Comptroller of the Currency duly and lawfully appointed receiver of said association, and as such receiver, duly appointed, qualified, acting and administering said trust, under the direction of the Comptroller of the Currency, and on the eighth day of said August, under and by virtue of said appointment, took possession of the assets of said association; and whereas on the twenty-fifth day of October, A. D. 1893, upon an accounting by said receiver and upon a valuation of uncollected assets remaining in the hands of said receiver, it appearing that in order to pay the debts of said association, it became necessary to enforce the individual liability of the stockholders, therefore, to the extent hereinafter mentioned, the Comptroller of the Currency did make an assessment and requisition upon the shareholders of said association for three hundred thousand dollars, to be paid by them ratably on or before the twenty-fifth day of November, A. D. 1893; and before the date and day last aforesaid, did make demand upon each and every one of said shareholders for one hundred dollars upon each and every share of the capital stock of said association, held or owned by them respectively, at the time of its failure, and did direct said receiver to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of such shareholders; of all which matter and things hereinbefore alleged, the defendant had then and there due notice and full knowledge, and by reason of the premises the defendant then and there became liable, and in con-

sideration thereof promised to pay to the plaintiff, in his capacity as receiver as aforesaid, on the said twenty-fifth day of November, A. D. 1893, the sum of ten thousand dollars, yet, although said day last mentioned has come and gone, the defendant has not paid the same.

Also in a plea of debt for that whereas said last-named association on the third day of August, A. D. 1893, failed, suspended and became insolvent, and was duly found and declared by the Comptroller of the Currency to be insolvent, the plaintiff was thereupon, on the said third day of August, A. D. 1893, duly and lawfully appointed
7 receiver thereof, by the Comptroller of the Currency, and duly qualified as such receiver, and his said appointment as said receiver is in full force and not revoked or annulled, and the defendant, at the date and time of such failure, held and owned and still holds and owns one hundred shares of the capital stock of said association of the par value of one hundred dollars per share; and said Comptroller of the Currency, on the twenty-fifth day of October, A. D. 1893, decided it was necessary to enforce the personal liability of said shareholders to the extent hereinafter mentioned, and did thereupon, on the day last above mentioned, make an assessment and requsition of one hundred dollars each share upon the stockholders and upon each and every share of said capital stock, held or owned by them respectively at the time aforesaid, to be paid to said receiver on or before the twenty-fifth day of November, A. D. 1893, and directed said receiver to enforce, by suit or otherwise, to that extent the personal liability of said shareholders, of all which matters and things hereinbefore alleged, the defendant then and there had due notice and full knowledge, and by reason of the premises the defendant then and there became liable, and in consideration thereof promised to pay to the plaintiff, the receiver as aforesaid, the sum of ten thousand dollars, on said twenty-fifth day of November, A. D. 1893. Yet, although said day has long since passed, defendant, although requested, has not paid the same, to the damage of the said plaintiff (as he says) the sum of fifteen thousand dollars, which shall then and there be made to appear, with other due damages.

This cause was entered at the May term of this court, A. D. 1895, when and where the parties appeared by their respective attorneys.

This cause was thence continued from term to term to the October term of this court, A. D. 1895, when on the eleventh day of October, A. D. 1895, the parties filed the following stipulation for waiving jury:

8 *Stipulation Waiving Jury.*

(Filed Oct. 11, 1895.)

It is agreed that trial by jury is waived in the above-entitled action, and that the same may be tried by the court, without jury,

in the same manner and reserving the same rights as if tried by jury.

J. S. H. FRINK, *For Plaintiff.*
STREETER, WALKER & HOLLIS,
For Defendant.

And on the 17th day of January, A. D. 1896, the court, the Honorable Edgar Aldrich, sitting, found the following facts:

Statement of Facts.

(Filed Jan. 17, 1896.)

The plaintiff is receiver of the Indianapolis National Bank of Indianapolis, which bank was duly organized and authorized to do business as a national banking association. The bank was declared insolvent and ceased to do business on the 24th day of July, 1893; the plaintiff was duly appointed and qualified receiver of the bank on the 3d day of August, 1893, and took possession of the assets of the bank on the 8th day of the same month. The capital stock of the bank was 3,000 shares of the par value of $100 each. On the 25th day of October, 1893, an assessment was ordered by the comptroller of $100 per share on the capital stock of the bank, to enforce the individual liability of shareholders, and an order made to pay such assessment on or before the 25th day of November, 1893, and the defendant was duly notified thereof.

The defendant, being a national banking association, duly organized and authorized to do business at Concord, N. H., on the 21st day of May, 1889, with a portion of its surplus funds, purchased of a third party, authorized to hold and make sale, 100 shares of the stock of the Indianapolis national bank, as an investment, and has ever since held the same as an investment. The defendant bank has appeared upon the books of the Indianapolis na-
9 tional bank as a shareholder of 100 shares of its stock, from the time of such purchase to the present time. During such holding the defendant bank received annual dividends declared by the Indianapolis bank prior to July, 1893. The defendant has not paid said assessment or any part thereof.

The parties of record, through their counsel of record, having appeared before me in this, a jury-waived case, and having adduced their evidence, I find the facts above stated.

EDGAR ALDRICH,
Presiding Judge.

January 17, 1896.

Record to be printed.

Argument upon question of law involved, February 17, 1896, 3 p. m.

EDGAR ALDRICH,
Presiding Judge.

This cause was thence continued to the present term, when to wit, on the twenty-eighth day of July, A. D. 1896, the following ruling is made:

Ruling.

(Filed July 28, 1896.)

ALDRICH, *J.:*

This case is submitted without argument. Upon the foregoing facts my impressions are with the plaintiff and my ruling therefore is that the plaintiff is entitled to recover.

To this ruling the defendant duly and seasonably excepted, stating the following grounds of exception.

First. The defendant, as a national banking association, has no power or authority to purchase with its surplus funds, as an investment, and hold as such, shares of stock in another national banking association. Such purchase and holding are *ultra vires* of the corporation.

Second. The defendant, as a national banking association, has no power or authority to incur any liability to pay the assessment sought to be recovered in this case.

Third. As a matter of law, the defendant is not liable upon the facts found, to pay the assessment sought to be recovered in this case.

10 On the sixth day of August, A. D. 1896, the defendant files the following bill of exceptions, the same being allowed by the court on the eleventh day of August, A. D. 1896:

Defendant's Bill of Exceptions.

(Filed Aug. 6, 1896, and allowed Aug. 11.)

This is an action of debt by the plaintiff, as receiver of the Indianapolis National Bank of Indianapolis, Ind., against the defendant, an alleged shareholder in said bank, to recover an assessment levied upon the shareholders of said Indianapolis national bank, under sect. 5151 of the Revised Statutes of the United States. The writ was entered at the May term, 1895, of said court.

Issue was duly joined, and on Oct. 11, 1895, the parties filed a written stipulation waiving trial by jury and agreeing that the case might be tried by the court, without jury, in the same manner and reserving the same rights as if tried by jury.

Afterwards, to wit, on Jan. 16, 1896, evidence on both sides having been considered, the court made findings of fact as appears in the following statement of facts, filed on said Jan. 17, 1896.

Statement of Facts.

(Filed Jan. 17, 1896.)

The plaintiff is receiver of the Indianapolis National Bank of Indianapolis, which bank was duly organized and authorized to do

business as a national banking association. The bank was declared insolvent and ceased to do business on the 24th day of July, 1893; the plaintiff was duly appointed and qualified receiver of the bank on the 3d day of August, 1893, and took possession of the assets *of the assets* of the bank on the 8th day of the same month. The capital stock of the bank was 3,000 shares of the par value of $100 each. On the 25th day of October, 1893, an assessment was ordered by the comptroller of $100 per share on the capital stock of the bank, to enforce the individual liability of shareholders, and an order made to pay such assessment on or before the 25th day of November, 1893, and the defendant was duly notified thereof.

The defendant, being a national banking association, duly organized and authorized to do business at Concord, N. H., on the 21st day of May, 1889, with a portion of its surplus funds, purchased of a third party, authorized to hold and make sale, 100 shares of the stock of the Indianapolis national bank as an investment,
11 and has ever since held the same as an investment. The defendant bank has appeared upon the books of the Indianapolis national bank as a shareholder of 100 shares of its stock, from the time of such purchase to the present time. During such holding the defendant bank received annual dividends declared by the Indianapolis bank prior to July, 1893. The defendant has not paid said assessment or any part thereof.

The parties of record, through their counsel of record, having appeared before me in this, a jury-waived case and having adduced their evidence, I find the facts above stated.

EDGAR ALDRICH,
Presiding Judge.

January 17, 1896.

The case being submitted without argument, the court made the following ruling:

"Upon the foregoing facts, my impressions are with the plaintiff, and my ruling therefore is that the plaintiff is entitled to recover."

To this ruling the defendant duly and seasonably excepted, stating the following grounds of exception:

First. The defendant, as a national banking association, has no power or authority to purchase with its surplus funds, as an investment, and hold as such, shares of stock in another national banking association. Such purchase and holding are *ultra vires* of the corporation.

Second. The defendant, as a national banking association, has no power or authority to incur any liability to pay the assessment sought to be recovered in this case.

Third. As a matter of law, the defendant is not liable upon the facts found, to pay the assessment sought to be recovered in this case.

THE FIRST NATIONAL BANK OF CONCORD,
By its attorneys, STREETER, WALKER & HOLLIS.

Aug. 11, 1896.

Allowed:

ALDRICH, *J.*

And on the twenty-fourth day of August, A. D. 1896, it is considered by the court, the Honorable Edgar Aldrich, district judge, sitting, that the plaintiff recover against the defendant the sum
12 of eleven thousand six hundred and forty-six dollars and sixty-seven cents ($11,646.67), damages, and costs taxed at seventy-two dollars and thirty cents ($72.30).

A true record.
Attest: FREMONT E. SHURTLEFF, *Clerk.*

Upon the rendering of this judgment the defendant petitions for a writ of error to the United States circuit court of appeals for the first circuit, and gives good and sufficient security that it will prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, and said writ of error is allowed.

Petition for Writ of Error to Circuit Court.

(Filed Sept. 16, 1896.)

To the honorable the judges of the circuit court of the United States within and for the district of New Hampshire:

The defendant, The First National Bank of Concord, in the action of Edward Hawkins, receiver, *v.* The First National Bank of Concord, representing and claiming that error in law appears of record therein, respectfully petition for a writ of error to the circuit court of appeals sitting in and for the first judicial circuit, and herewith file their assignment of errors.

THE FIRST NATIONAL BANK
OF CONCORD,
By its attorneys, STREETER, WALKER & HOLLIS.

A true copy.
Attest: FREMONT E. SHURTLEFF, *Clerk.*

Assignment of Errors in Circuit Court.

(Filed Sept. 16, 1896.)

Afterwards, to wit, on the sixth day of October in the year of our Lord one thousand eight hundred and ninety-six, at the October term for 1896 of the United States circuit court of appeals for the first circuit, at the city of Boston, in the Commonwealth of Massachusetts, comes the said First National Bank of Concord, by Frank S. Streeter, its attorney, and says that in the record and pro-
13 ceedings in the above-entitled matter, there is manifest error in this, to wit:—

First. The circuit court has erred in ruling that the plaintiff in this case is entitled to recover, as appears by the following statement:

" Evidence on both sides having been considered, the court made

findings of fact as appears in the following statement of facts, filed on said Jan. 17, 1896.

Statement of Facts.

(Filed Jan. 17, 1896.)

The plaintiff is receiver of the Indianapolis National Bank of Indianapolis, which bank was duly organized and authorized to do business as a national banking association. The bank was declared insolvent and ceased to do business on the twenty-fourth day of July, 1893; the plaintiff was duly appointed and qualified receiver of the bank on the third day of August, 1893, and took possession of the assets of the bank on the eighth day of the same month. The capital stock of the bank was 3,000 shares of the par value of $100 each. On the 25th day of October, 1893, an assessment was ordered by the comptroller of $100 per share on the capital stock of the bank, to enforce the individual liability of shareholders, and an order made to pay such assessment on or before the 25th day of November, 1893, and the defendant was duly notified thereof.

The defendant, being a national banking association, duly organized and authorized to do business at Concord, N. H., on the 21st day of May, 1889, with a portion of its surplus funds, purchased of a third party authorized to hold and make sale, 100 shares of the stock of the Indianapolis national bank, as an investment, and has ever since held the same as an investment. The defendant bank has appeared upon the books of the Indianapolis national bank as a shareholder of 100 shares of its stock, from the time of such purchase to the present time. During such holding the defendant bank received annual dividends declared by the Indianapolis bank prior to July, 1893. The defendant has not paid said assessment or any part thereof.

The parties of record, through their counsel of record, having appeared before me in this, a jury-waived case, and having adduced their evidence, I find the facts above stated.

EDGAR ALDRICH,
Presiding Judge.

January 17, 1896.

14 The case being submitted without argument, the court made the following ruling:

"Upon the foregoing facts, my impressions are that the plaintiff is entitled to recover.

To this ruling the defendant duly and seasonably excepted, stating the following grounds of exception:

First. The defendant, as a national banking association, has no power or authority to purchase with its surplus funds, as an investment, and hold as such, shares of stock in another national banking association. Such purchase and holding are *untra vires* of the corporation.

Second. The defendant, as a national banking association, has no power or authority to incur any liability to pay the assessment sought to be recovered in this case.

Third. As a matter of law, the defendant is not liable upon the facts found to pay the assessment sought to be recovered in this case."

Wherefore the said First National Bank of Concord prays that the ruling of said circuit court of the United States be revised, and that the judgment entered thereupon be reversed.

THE FIRST NATIONAL BANK
OF CONCORD,
By its attorney, FRANK S. STREETER.

A true copy.
Attest: FREMONT E. SHURTLEFF, *Clerk.*

Bond on Writ of Error to Circuit Court.

(Filed Sept. 16, 1896.)

Know all men by these presents, that we, The First National Bank of Concord, a national banking association duly authorized, and located at Concord, N. H, as principal, and Wm. F. Thayer and Wm. A. Stone, both of said Concord, as sureties, are held and firmly bound unto Edward Hawkins, receiver of the Indianapolis national bank, duly authorized and located at Indianapolis, Ind., in the full and just sum of two hundred and fifty dollars, to be paid to the said Edward Hawkins, receiver, or his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fifteenth day of September, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a circuit court of the United States for
15 the district of New Hampshire, in a suit depending in said court, between said Edward Hawkins, receiver, plaintiff, and said First National Bank of Concord, defendant, judgment was rendered against the said First National Bank of Concord and the said First National Bank of Concord having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Edward Hawkins, receiver, citing and admonishing him to be and appear in the United States circuit court of appeals for the first circuit, in the city of Boston, Mass., on the sixth day of October, A. D. 1896:

Now, the condition of the above obligation is such, that if the said First National Bank of Concord shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea

good, then the above obligation to be void; else to remain in full force and virtue.

FIRST NATIONAL BANK,
CONCORD, N. H., [SEAL.]
By WM. F. THAYER, *Pr.*
WM. F. THAYER. [SEAL.]
W. A. STONE, JR. [SEAL.]

Sealed and delivered in presence of—
FRANK E. SHEPARD.
E. F. PHILBRICK.

Approved:
EDGAR ALDRICH,
Presiding Judge.

A true copy.
Attest: FREMONT E. SHURTLEFF, *Clerk.*

Citation on Writ of Error to Circuit Court.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Edward Hawkins, of Indianapolis, in the district of Indiana, as you are receiver of the Indianapolis National Bank of Indianapolis, a national banking association established and organized under the laws of the United States, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the first circuit, in the city of Boston, Mass., on the sixth day of October, next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of New Hampshire, wherein The First National Bank of Concord, a national banking association established and organized under the laws of the United States and located at Concord, in the State of New Hampshire, is plaintiff
16 in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edgar Aldrich, judge of the circuit court of the United States for the district of New Hampshire, this sixteenth day of September, in the year of our Lord one thousand eight hundred and ninety-six.

EDGAR ALDRICH,
Presiding Judge.

PORTSMOUTH, N. H., *Sept.* 21, 1896.

Due and sufficient service of the within citation is hereby acknowledged.

J. S. H. FRINK,
Attorney for Defendant in Error.

Circuit Court Clerk's Certificate.

UNITED STATES OF AMERICA, *District of New Hampshire,* } ss:

I, Fremont E. Shurtleff, clerk of the circuit court of the United States for the district of New Hampshire, hereby certify that the foregoing is a true copy of the record and all proceedings in the cause entitled, Edward Hawkins, plaintiff, *v.* First National Bank of Concord, defendant, No. 405, law docket, in said circuit court determined, the petition for writ of error, the assignment of errors, and the bond to party on writ of error, and also the original citation upon the writ of error issued in said cause with acknowledgment of service thereon.

In testimony whereof, I hereto set my hand and affix the seal of said circuit court at Concord, this fifth day of October, in the year of our Lord one thousand eight hundred and ninety-six.

[SEAL.] FREMONT E. SHURTLEFF, *Clerk.*

A true copy of transcript of record of circuit court returned, with writ of error, to trial court.

Attest: JOHN G. STETSON, *Clerk.*

17 United States Circuit Court of Appeals for the First Circuit, October Term, 1896.

FIRST NATIONAL BANK OF CONCORD, Defendant, Plaintiff in Error,
v.
EDWARD HAWKINS, Receiver, Plaintiff, Defendant in Error. } No. 202.

Error to the circuit court for the district of New Hampshire.

Before Colt, Putnam, and Webb, JJ.

Opinion of the Court.

March 5, 1897.

PUTNAM, *J.:*

This case is based by the plaintiff in error on the proposition that it had no power under the law of its creation to acquire the stock of another national bank as an investment. It is not necessary for us to consider this proposition. It is settled that it had full power to loan on the stock as collateral, or to take it in settlement of a doubtful debt, and in either case, as incidental thereto, to cause the stock to be transferred into its own name absolutely if it deemed it for its interest so to do. First National Bank of Charlotte *v.* National Exchange Bank of Baltimore, 92 U. S., 122; National Bank *v.* Case, 99 U. S., 628. Therefore, on the face of the transaction, no illegality appeared, and nothing to advise, either the bank whose

stock it acquired, or the existing or future creditors of that
18 bank, or the Comptroller of the Currency, who was their quasi-public representative, that the transaction was not within the scope of the unquestionable powers of the plaintiff in error.

Under these circumstances the entire trend of the law is that the plaintiff in error is estopped to deny its liability in this case. Chubb *v.* Upton, 95 U. S., 665; Pullman *v.* Upton, 96 U. S., 328, 330; National Bank *v.* Case, 99 U. S., 628; Scovill *v.* Thayer, 105 U. S., 143, 149; Anderson *v.* Philadelphia Warehouse Company, 111 U. S., 479, 483; Whitney *v.* Butler, 118 U. S., 655, 660. There might arise some exceptional instances where, for special reasons, this estoppel would not apply; as where stock had been issued in excess of the authorized limit (Scovill *v.* Thayer, *ubi supra*), or where, in the cases represented by section 5152 of the Revised Statutes, there are no interests capable of binding themselves either by contract or estoppel, or where the substance of the transaction appears on its face, as in Beal *v.* Essex Savings Bank, decided by us and reported in 33 U. S. App., 101, and 67 Fed. Rep., 816; although the latter class is not strictly exceptional. But none of those special elements are found here. We have no need to reconcile Burgess *v.* Seligman, 107 U. S., 20, which arose on a statute of Missouri, as the decisions referred to by us apply directly to national banks, and come down to a later date.

The plaintiff in error maintains that the liability sought to be enforced here is merely contractual, flowing out of the acquisition of the stock in question and continuous upon it; so that, therefore, if the original investment was unauthorized, the liability, being still *in fieri*, cannot be enforced. But this does not correctly state the nature of the liability. There can be no substantial doubt that, whether the purchase of the stock was authorized or not, the plaintiff in error was, after its transfer, by the force of the transaction, its owner, and that no one else could stand as such. Under these circumstances, the liability sought to be enforced here arises
19 by force of the statute, and is not contractual. Keyser *v.* Hitz, 133 U. S., 138, 151.

Indeed the expressions of the Supreme Court found in National Bank *v.* Case, *ubi supra*, are so much in harmony with the rules deducible from the practical conclusions of that court in the cases to which we have referred, that we accept them as disposing of this suit. The court said, at page 633:

"There is nothing in the argument on behalf of the appellant that the bank was not authorized to make a loan with the stock of another bank pledged as collateral security. That is an ordinary mode of loaning, and there is nothing in the letter or spirit of the national banking act that prohibits it. But if there were, the lender could not set up its own violation of law to escape the responsibility resulting from its illegal action."

The judgment of the circuit court is affirmed, with interest, and with the costs of this court to the defendant in error.

A true copy.

Attest: JOHN G. STETSON, *Clerk.*

20 United States Circuit Court of Appeals for the First Circuit, October Term, 1896.

FIRST NATIONAL BANK OF CONCORD, Defendant, Plaintiff in Error,
v.
EDWARD HAWKINS, Receiver, Plaintiff, Defendant in Error. } No. 202.

Error to the circuit court for the district of New Hampshire.

Judgment.

March 5, 1897.

This cause came on to be heard February 24, 1897, on the transcript of record of the circuit court of the United States for the district of New Hampshire, and was argued by counsel.

On consideration whereof it is now, to wit, March 5, 1897, ordered and adjudged as follows: The judgment of the circuit court is affirmed, with interest, and with the costs of this court to the defendant in error.

By the court.

JOHN G. STETSON, *Clerk.*

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

21 United States Circuit Court of Appeals for the First Circuit, October Term, 1896.

FIRST NATIONAL BANK OF CONCORD, N. H., Defendant, Plaintiff in Error,
v.
EDWARD HAWKINS, Receiver, Plaintiff, Defendant in Error. } No. 176.

Petition of the First National Bank of Concord, N. H., for a Rehearing.

(Filed July 5, 1897.)

To the honorable the judges of the United States circuit court of appeals for the first circuit:

Your petitioner, The First National Bank of Concord, N. H., by its counsel respectfully represents as follows:

That it is the plaintiff in error in the above-entitled cause lately heard in this court, and that it verily believes that it has good and sufficient cause why said action should be reheard on certain points, and why judgment should be entered herein other than the one affirming the judgment of the circuit court; and that an order of judgment should be entered sustaining your petitioner's writ of error, reversing or vacating the judgment of the circuit court, and remanding the case to the circuit court, with directions to enter judgment for the defendant, plaintiff in error. And it respectfully shows the following as the grounds for this its petition:

1. By its said writ of error, your petition- contended that the defendant as a national banking association had no power or authority to purchase with its surplus funds as an investment, and hold
22 as such, shares of stock in another national banking association, and that such purchase and holding were *ultra vires* of the corporation; also that the defendant as a national banking association had no power or authority to incur any liability to pay the assessment sought to be recovered of it in this case; also that, as a matter of law, the defendant is not liable upon the facts found, to pay the assessment sought to be recovered in this case.

The petitioner further contended that it was not estopped to urge its want of authority to purchase said stock as an investment, to defeat the attempt to enforce against it the liability of a stockholder.

2. On behalf of your petitioner it is further shown that in the decision of this honorable court filed March 5, 1897, it was held to be unnecessary to consider whether the petitioner had power under the laws of its creation—the national banking act, so called—to acquire the stock of another national bank as an investment, because if it had not such power, it would be estopped to urge such want of power in denial of its liability in this case, and for this reason the judgment of the circuit court was affirmed by this court.

3. On behalf of your petitioner, it is further shown, that since the aforesaid decision of this court on, to wit, May 24, 1897, the questions involved herein have been finally determined by the Supreme Court of the United States in the case California National Bank *v.* Kennedy, published in the Supreme Court Reporter, vol. 17, No. 31, June 7, 1897, and the said determination of the Supreme Court is hereby referred to and made a part of this motion.

It is further shown, that under the aforesaid decision of the Supreme Court of the United States in California National Bank *v.* Kennedy, it is held (1) that the statutes of the United States relating to the organization and powers of national banks prohibit them from purchasing or subscribing to the stock of any other corporation; and (2) that the want of such power can be urged by any national bank to defeat an attempt to enforce against it the liability of a stockholder in such other corporation.

4. On behalf of the petitioner, it is further suggested, that because this honorable court, in its decision of March 5, 1897, did not have the aid of the determination of the Supreme Court of the United States rendered in California National Bank *v.* Kennedy, May 24, 1897, and because the determination of said Supreme Court seems to be conclusive upon the questions involved in the case at bar, justice requires that a rehearing be had upon said questions
23 before this court, to the end that this court may reconsider its said decision, and the legal and practical effect of the said determination of the Supreme Court upon the same.

It is further suggested that if, as it now appears, the said determination of the Supreme Court of the United States is conclusive upon the right of the plaintiff in error to have judgment in the case at bar, it would not be just or equitable that the plaintiff in error should be compelled to seek relief by suing out a writ or error to

the Supreme Court of the United States, but that this honorable court may properly reconsider said questions, and determine the same in accordance with legal principles established by said Supreme Court of the United States.

Wherefore, your petitioner respectfully prays that this cause may be ordered to be reheard or reargued as soon as may be, at a time to be fixed by this honorable court, on the questions whether the order or judgment of this court affirming the judgment of the circuit court should not be vacated and reversed so as to sustain your petitioner's writ of error, and reverse the judgment of the circuit court, and remand the case to the circuit court with directions to that effect, and to enter judgment for the petitioner with costs, or that such order may be made in the premises as may be just.

And your petitioner will ever pray.

THE FIRST NATIONAL BANK OF CONCORD,
Defendant, Plaintiff in Error, and Petitioner,
By its attorney FRANK S. STREETER.

JUNE 26, 1897.

I, Frank S. Streeter, do hereby certify that I am counsel for the above-named petitioner; that I have prepared the foregoing petition, and believe that the cause is proper to be reheard upon the points set forth in said petition; that the reasons therein given for a rehearing or reargument of this cause are, in my opinion, well founded in point of law; and, further, that the relief prayed for is proper and equitable to be granted in this cause.

FRANK S. STREETER,
Counsel for Defendant, Plaintiff in Error, and Petitioner.

June 26, 1897.

24 United States Circuit Court of Appeals for the First Circuit, October Term, 1896.

FIRST NATIONAL BANK OF CONCORD, Defendant, Plaintiff in Error,
v.
EDWARD HAWKINS, Receiver, Plaintiff, Defendant in Error. } No. 202.

Error to the circuit court for the district of New Hampshire.

Before Colt, Putnam, and Webb, JJ.

Opinion of the Court.

July 20, 1897.

PUTNAM, *J.*:

The plaintiff in error has filed a petition for a rehearing, resting on California Bank *v.* Kennedy, 167 U. S., 362, which was decided a few days after our decision in this case. The issue considered by

the Supreme Court was the liability of a national bank as a stockholder in a State savings bank, while the question before us was as to its liability as a stockholder in another national bank. The question discussed by the Supreme Court was more largely that of *ultra vires* than that of the policy of the statutes relating to national banking associations, and its line of decisions which we understood to bind us in the case at bar were not particularly noticed by it. Therefore, it does not follow beyond question that California Bank *v.* Kennedy is decisive of the case at bar.

Inasmuch as the defendant in error has undoubted means of relief by a writ of error, we, under the circumstances, are of the opinion that the petition should be denied.

Petition for rehearing denied; mandate to stay until further order.

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

25 United States Circuit Court of Appeals for the First Circuit, October Term, 1896.

FIRST NATIONAL BANK OF CONCORD, Defendant, Plaintiff in Error,
v.
EDWARD HAWKINS, Receiver, Plaintiff, Defendant in Error. } No. 202.

Order of Court.

September 18, 1897.

It is now, to wit, September 18, 1897, ordered by the court that a mandate issue in this cause when applied for.

By the court:.

JOHN G. STETSON, *Clerk.*

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

26 United States Circuit Court of Appeals for the First Circuit, October Term, 1896.

FIRST NATIONAL BANK OF CONCORD, Defendant, Plaintiff in Error,
v.
EDWARD HAWKINS, Receiver, Plaintiff, Defendant in Error. } No. 202.

Assignment of Errors.

(Filed September 18, 1897, with clerk of U. S. circuit court of appeals for the first circuit.)

Now comes the above-named plaintiff in error, The First National Bank of Concord, New Hampshire, by Frank S. Streeter, its attor-

ney, and says that in the records and proceedings in the above-entitled action in the United States circuit court of appeals for the first circuit there is manifest error in this, to wit:

First. The plaintiff in error assigns as error the several errors set out in the assignment of errors forming a part of the record in said action before the said circuit court of appeals, namely:

That the court erred in ruling that the plaintiff (defendant in error herein) is entitled to recover upon the facts found, in that:

1. The defendant (plaintiff in error herein), as a national banking association, has no power or authority to purchase with its surplus funds as an investment and hold as such shares of stock in another national banking association; such purchase and holding are *ultra vires* of the corporation.

27 2. The defendant (plaintiff in error herein), as a national banking association, has no power or authority to incur any liability to pay the assessment sought to be recovered in this case.

3. As a matter of law, the defendant (plaintiff in error herein) is not liable upon the facts found to pay the assessment sought to be recovered in this case.

Second. That said circuit court of appeals, before which was heard the writ of error which brought up the record in this action from the circuit court of the United States for the district of New Hampshire to said circuit court of appeals, erred in making its order on the fifth day of March, 1897, affirming the judgment of the said circuit court of the United States, with interest and with the costs of said circuit court of appeals to the defendant in error.

Third. That said circuit court of appeals erred in not sustaining the writ of error then before it and not reversing the judgment entered in this action in said circuit court.

And the said First National Bank of Concord, plaintiff in error, prays that the judgment aforesaid entered in this action in the circuit court for the district of New Hampshire and the order entered therein, as aforesaid, by the circuit court of appeals, to wit, the judgment of affirmance rendered on the fifth day of March, 1897, for the errors aforesaid and for other errors in the records and proceedings aforesaid, be reversed, annulled, and altogether held for naught, and that the plaintiff in error may be restored to all things which it has lost by reason of said judgment and order.

Dated September 18, 1897.

THE FIRST NATIONAL BANK OF CONCORD, N. H.,
By its attorney, FRANK S. STREETER.

A true copy.

Attest: JOHN G. STETSON, *Clerk.*

28 *Certificate of Clerk of United States Circuit Court of Appeals for the First Circuit.*

UNITED STATES OF AMERICA, *First Judicial Circuit,* } ss.:

I, John G. Stetson, clerk of the United States circuit court of appeals for the first circuit, certify that the foregoing pages, 3 to 27, inclusive, contain and are a true copy of the record and all proceedings in the cause entitled First National Bank of Concord, defendant, plaintiff in error, *v.* Edward Hawkins, receiver, plaintiff, defendant in error, No. 202, in said United States circuit court of appeals for the first circuit determined.

I further certify that annexed hereto is a true copy of a bond on writ of error to said United States circuit court of appeals in said cause, which bond is on file in the office of the clerk of said circuit court of appeals.

Seal United States Circuit Court of Appeals, First Circuit.

In testimony whereof I hereunto set my hand and affix the seal of said United States circuit court of appeals, at Boston, in the first judicial circuit, this sixteenth day of October, A. D. 1897.

JOHN G. STETSON, *Clerk.*

29 *Bond to Party on Writ of Error to United States Circuit Court of Appeals for the First Circuit.*

Know all men by these presents that we, The First National Bank of Concord, New Hampshire, a national banking association duly organized and doing business at said Concord, as principal, and William F. Thayer and William A. Stone, both of said Concord, as sureties, are held and firmly bound unto Edward Hawkins, receiver of the Indianapolis national bank, a national banking association duly organized and formerly doing business at Indianapolis, Indiana, in the full and just sum of fifteen thousand —, to be paid to the said Edward Hawkins, receiver, or — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twentieth day of September, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at a United States circuit court of appeals for the first circuit, in a suit depending in said court between said First National Bank of Concord, New Hampshire, plaintiff in error, and said Edward Hawkins, receiver, defendant in error, a judgment was rendered against the said First National Bank of Concord, New Hampshire, plaintiff in error, and the said First National Bank of Concord, New Hampshire, plaintiff in error, having obtained a writ of error and filed a copy thereof in the clerk's office of the said

court to reverse the judgment in the aforesaid suit, and a citation directed to the said Edward Hawkins, receiver, defendant in error, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said First National Bank of Concord, New Hampshire, plaintiff in error, shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE FIRST NATIONAL BANK OF CONCORD, N. H.,
By W. F. THAYER, *Pres't.* [SEAL.]
W. F. THAYER. [SEAL.]
W. A. STONE, JR. [SEAL.]

Sealed and delivered in presence of—
EDITH M. BURLEIGH.
FRANK E. SHEPARD.

Approved September 21, 1897, by—
HORACE GRAY,
Associate Justice of the Supreme Court of the United States.

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

30 UNITED STATES OF AMERICA, *ss:*

To Edward Hawkins, of Indianapolis, in the district of Indiana, as you are receiver of the Indianapolis National Bank of Indianapolis, a national banking association established and organized under the laws of the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the first circuit, wherein The First National Bank of Concord, New Hampshire, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Horace Gray, associate justice of the Supreme Court of the United States, this twenty-first day of September, in the year of our Lord one thousand eight hundred and ninety-seven.

HORACE GRAY,
Associate Justice of the Supreme Court of the United States.

31 On this eighteenth day of October, in the year of our Lord one thousand eight hundred and ninety-seven, personally appeared Frank S. Streeter, counsel for the First National Bank of Concord, before me, the subscriber, a notary public within and for the State of New Hampshire, and makes oath that on the fifteenth day of October, 1897, he delivered a true copy of the within citation to J. S. H. Frink, of Portsmouth, New Hampshire, counsel of record for Edward Hawkins, receiver.

Sworn to and subscribed this eighteenth day of October, 1897, before me—

[Seal of R. E. Walker, Notary Public, State of New Hampshire.]

R. E. WALKER,
Notary Public in and for the State of New Hampshire.

Endorsed on cover: Case No. 16,704. U. S. C. C. of appeals, 1st circuit. Term No., 187. The First National Bank of Concord, New Hampshire, plaintiff in error, *vs.* Edward Hawkins, receiver of the Indianapolis National Bank of Indianapolis. Filed October 21, 1897.